

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

**STEPHANIE ANN THURMAN HARTMAN v. DARYL O'BRIEN
HARTMAN**

**Appeal from the Family Court for Rhea County
No. 20662 James W. McKenzie, Judge**

No. E2005-02717-COA-R3-CV - FILED AUGUST 29, 2006

In this post-divorce proceeding, Daryl O'Brien Hartman ("Father") and Stephanie Ann Thurman Wallace, formerly Hartman ("Mother"), sought to modify the parties' residential schedule pertaining to their children. That schedule, which was a part of the parties' Marital Dissolution Agreement ("the MDA"), provided that Grayson McKenna Hartman and McKenzie Daryl Emerson Hartman (collectively "the children") would reside with Father in Rhea County during the time Mother was working in Atlanta. The MDA stipulated that when Mother was not working in Atlanta, she would have custody of the children. Two years after the divorce, Father filed a petition seeking primary custody, alleging that, contrary to the contemplation of the parties at the time of the divorce, Mother had failed to return to Tennessee and assume equal parenting time with the children. Father also requested that Mother be required to pay child support. Mother responded by filing a counterclaim seeking a modification of the custody arrangement. She alleged that Father's excessive drinking and lack of steady employment justified a modification. The trial court awarded Father custody, a judgment which we later vacated. This case was remanded back to the trial court with instructions to conduct a hearing on the comparative fitness of the parents. After a hearing, the trial court again awarded primary custody to Father. Mother appeals, arguing (1) that the trial court abused its discretion in concluding that Father was the more fit parent; and (2) that the trial court unreasonably delayed the proceedings that followed this Court's remand. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Family Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Lucy C. Wright, Chattanooga, Tennessee, for the appellant, Stephanie Ann Thurman Wallace.

Mechelle Story, Spring City, Tennessee, for the appellee, Daryl O'Brien Hartman.

Susan E. Arnold, Dayton, Tennessee, Guardian Ad Litem for the children, Grayson McKenna Hartman and McKenzie Daryl Emerson Hartman.

OPINION

I.

The parties were divorced in July, 2000. The MDA was approved by the trial court and incorporated into the final judgment of divorce. The MDA provides, in pertinent part, as follows:

The Parties shall retain joint legal custody of the minor children: Grayson McKenna Hartman, born March 25, 1995, and McKen[z]ie Daryl Emerson Hartman, born January 25, 1998. The children shall reside with the father, Daryl O'Brien Hartman, while the mother is residing and working in Atlanta, Georgia. The children shall reside with the mother, Stephanie Ann Thurman Hartman, at all times when she is not working and at other times agreeable to the parties.

The Parties contemplate that [Mother] will return to Rhea County, Tennessee. Upon [Mother's] resumption of residency in Tennessee the physical custody of the minor children shall be with her with [Father] having visitation at all reasonable times and places upon reasonable notice.

Upon the assumption of physical custody by [Mother,] [Father] will pay to her the sum of seventy-five dollars (\$75.00) per week as child support. The Parties acknowledge that [Father's] employment has seasonal variances and that this sum is in substantial compliance with the Tennessee Child Support Guidelines.

(Paragraph numbering in original omitted). Following the divorce, Mother continued to reside and work in Georgia. She subsequently married Matthew Wallace and purchased a house in Georgia. Mother's job required her to work Thursday through Monday; thus, she had custody of the children on Tuesdays and Wednesdays.

On June 26, 2002, Father filed his petition to modify the custody arrangement and to set child support. Father asserted that, at the time of the divorce, it was contemplated that Mother would be returning to Tennessee to reside. He argued that it was further contemplated that, when Mother did return to Tennessee, the parties would share parenting time equally. Because Mother was still residing in Georgia and not equally sharing in the parenting of the children, Father requested that the children be allowed to live with him "full time" and that his house be designated the children's primary residence. He also requested that Mother have visitation every other weekend and that she be required to pay child support. Wife responded to Father's petition by denying that the parties

contemplated, at the time of the divorce, that she would be “returning to Tennessee to reside in Tennessee.” She counterclaimed for primary custody of the children, alleging that Father’s drinking and lack of steady employment constituted a substantial change in circumstances.

After a hearing on the matter, the trial court entered an order finding, in relevant part, as follows:

That [Father]’s residence has been the primary residence of the minor children since the date of divorce.

That at the time the Final Decree of Divorce was entered it was contemplated that [Mother] would be returning to Tennessee to reside and at that time the minor children would reside with her and [Father] would provide support.

That [Mother] has not returned to reside in Tennessee and has not been under a court order to provide support for the minor children.

That the minor children have suffered a material change of circumstances in that it was not understood what length of time [Mother] would continue to reside in Georgia at the time the Final Decree of Divorce was entered and that while [Mother] resides in Georgia, [Father] was listed as the sole supporter of the minor children and it was not his intent that he provide support without aid from [Mother] indefinitely.

That it is in the best interest of the minor children that [Father] be the primary residential parent and his home be the primary residence of the minor children.

That [Mother] will exercise her parenting time beginning on Tuesday after school until Thursday at 6:00 p.m. every week.

(Paragraph numbering in original omitted). Mother appealed that judgment. The principal issue on that first appeal was whether the trial court had erred by awarding Father primary custody of the children without comparing the current fitness of each parent. *Hartman v. Hartman*, No. E2003-02380-COA-R3-CV, 2004 WL 1334513, at *2 (Tenn. Ct. App. E.S., filed June 15, 2004). This Court agreed with Mother, stating that “after finding the circumstances of the children and their custody had changed in a material way the trial court should have carefully compared the fitness of each parent.” *Id.* Because the trial court made no analysis of the parties’ comparative fitness, we vacated the judgment and remanded the case with instructions that the trial court conduct “a plenary comparative fitness analysis.” *Id.*, at * 4. Pending the trial court’s final resolution of this issue, the residential schedule set forth in the MDA was to remain in effect. *Id.*

The parties next appeared before the trial court on July 19, 2004. At this hearing, and at the request of Mother, the trial court appointed a guardian ad litem for the children. A hearing was then set for September 15, 2004. The matter was continued from September 15, 2004 to November 17, 2004 by way of an agreed order.

At the November 17, 2004, hearing, Father's counsel noted that she had received Mother's trial brief just two days before the hearing date, and that, before the trial court rendered a decision in the matter, Father would like an opportunity to file a responsive brief. The trial court gave Father 15 days to file his response to Mother's trial brief. The trial court also stated that Mother would be allowed additional time to file a reply brief to Father's response if she so desired. The court also noted that the guardian ad litem would be given time to respond to the briefs. The trial court then heard testimony regarding each of the parties' current living arrangement and fitness as a parent. The children, the parties, and the parties' respective significant others, *i.e.*, Mother's new husband, Matthew Wallace, and Father's then-girlfriend, Melissa Gibson, testified at the hearing.

Father filed his response to Mother's trial brief on December 2, 2004. Mother filed her reply to Father's brief on April 29, 2005. The parties again appeared before the trial court on May 4, 2005, for oral argument. However, at that point in time, the guardian ad litem requested a continuance because she had just received a copy of Mother's reply brief that morning. The trial court granted the guardian ad litem an extension within which to file a responsive brief. The matter was continued to July 18, 2005. The guardian ad litem filed her brief on June 3, 2005.

Oral argument was received by the court on July 18, 2005. The trial court reviewed its notes from the November 17, 2004, hearing and rendered its opinion, again designating Father as the primary residential parent of the children. The order of the trial court, which was entered on September 21, 2005, makes the following findings:

That in considering the love and affection between the parties and the children it is apparent that the parties love the children and the children love the parents. However, the Court finds that the ties favored [Father].

That regarding disposition of the parties to provide care and support for the minor children the Court finds that there is no question as to what was agreed upon at the time of the divorce, and it is the Court's opinion that [Father] is the primary caregiver and has provided the necessary care for the minor children and that [Mother]'s contributions have been minimal.

That the Court finds that there has been no indication that [Father]'s drinking has affected the children in a way that is detrimental to them or has affected their well-being.

That both parties have had other persons residing in the residence with the minor children. The Court finds that [Father] has tried to be good to the children and Ms. Gibson has helped with the children and has become a positive influence in their lives.

The Court has ordered that if [Father] is not married to the young lady residing in his home, Melissa Gibson, she must move out of the residence, or if they are married a marriage certificate must be provided to show verification of said matrimony.

The Court has reviewed the school records of the minor children and the school records indicate that the children are doing well.

The Court has heard the preferences of the minor children and while not a determining factor the Court has taken them into consideration along with the entire record.

That the Court finds that there has been no emotional or physical abuse to the minor children.

The Court finds that [Father] has let the children visit with their mother and also appears to be the proper person to have custody of the children in that regard.

The Court has found that there has been no misconduct toward the children.

The Court finds that age of the parents is relatively similar and is not a determining factor.

The Court is aware that there have been allegations of domestic violence and places little weight on those allegations.

The Court finds that the children have outside interests and that those interests are best met while residing with [Father].

[Father] clearly has extended family to help with the minor children and has definite third party support. That factor weighs in favor of [Father].

The Court has considered the financial circumstances of the parties and finds that [Mother] does have stable employment and is financially able to provide for the children but does not find that that is enough to award her primary residential custody of the children.

(Paragraph numbering in original omitted). Mother was given visitation rights every other weekend and four weeks during the summer. The order directed Mother to pay Father \$146.92 per week for child support. This appeal followed.

II.

Mother's principal issue on appeal is whether the trial court abused its discretion in awarding custody of the children to Father. She asserts that the trial court "basically ignored the overwhelming evidence that [she] is clearly more fit than [Father] in a comparative fitness analysis." We disagree.

Our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d); **Massengale v. Massengale**, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995). Trial courts have broad discretion in developing and implementing custody and visitation arrangements that are suited to the specific facts of each case, as the trial court has the benefit of observing the parties' demeanor and assessing credibility first hand. **Davis v. Davis**, No. M2003-02312-COA-R3-CV, 2004 WL 2296507, at *3 (Tenn. Ct. App. M.S., filed October 12, 2004) (citations omitted). Therefore, it is not the role of an appellate court to "tweak [these decisions] in the hopes of achieving a more reasonable result than the trial court," but rather, such courts should only set aside the trial court's judgment when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." **Eldridge v. Eldridge**, 42 S.W.3d 82, 88 (Tenn. 2001).

There are "[n]o hard and fast rules . . . for determining which custody and visitation arrangement will best serve a child's needs." **Gaskill v. Gaskill**, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996). A custody determination is "factually driven and requires the courts to carefully weigh numerous considerations." *Id.* The overriding consideration is the best interest of the child. *Id.* The factors a trial court is to consider when determining the custody of children are set forth in Tenn. Code Ann. § 36-6-106 (2005), which provides, in pertinent part, as follows:

- (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:
 - (1) The love, affection and emotional ties existing between the parents and child;

- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . . ;
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
- (7) (A) The reasonable preference of the child if twelve (12) years of age or older.

(B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;

- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;

- (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

- (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Id.

In the instant case, there is an abundance of evidence suggesting that there is "love, affection and emotional ties existing between [both] parents and [their] child[ren]." *See* Tenn. Code Ann. § 36-6-106(a)(1). The children's testimony indicates that they love both parents. However, the trial court found that the "love, affection and emotional ties" favored Father. Since the parties' divorce in 2000, the children have primarily been in Father's custody and control; thus, Father has had more time to foster the parent-child relationship. We hold that the evidence does not preponderate against the trial court's finding that this factor favored Father.

The evidence reveals that both parents provide the children with food, clothing, and other necessary care while they are in their custody. *See* Tenn. Code Ann. § 36-6-106(a)(2). The trial court found that Father was the children's primary caregiver and that he had adequately provided for them. The trial court also found that Mother's contributions had been minimal. The evidence supports these findings as well. The original residential arrangement provided by the parties' MDA did not require Mother to pay child support to Father. Mother's financial support of the children was limited to when the children were in her custody. Father therefore provided the majority of the children's financial support.

Mother points to Father's frequent changes in employment in arguing that she is "more fit financially" and can better provide for the children. She stresses the fact that she, not Father, has provided medical insurance for the children. Testimony in the record indicates that the nature of Father's work, *i.e.*, construction work, requires frequent changes. When Father completed a project, he would search for another project. The changing nature of Father's employment existed at the time of the divorce.

Mother also calls into question the "physical situation" in Father's home. She states that each child would have his/her own room at Mother's home in Georgia. In Tennessee, the children have their own rooms, but they frequently share their rooms with Ms. Gibson's two young sons or decide to sleep in the living room on a "pallet." The children testified that they enjoyed sharing space with their new stepbrothers. There is nothing in the record to indicate, as suggested by Mother, that Father has failed, or will fail, to properly provide the children with the necessary care. *See id.*

The continuity and stability of the children's environment also support the trial court's award of custody to Father. *See* Tenn. Code Ann. § 36-6-106(a)(3), (4). The children have resided in Father's home for most of their lives. Prior to the divorce, Father's home was the marital residence. Father has numerous family members living in the vicinity of his home. The paternal grandparents, who have a very loving relationship with the children and who often assist Father in taking care of them, reside near Father's home. The children also have numerous farm animals and pets at Father's home.

The allegations regarding Father's "excessive drinking" habits are relevant here. Father previously admitted to drinking "five or six beers" each day. He has always denied an addiction problem. The record reflects that Father has consumed beer in the presence of the children. The record also reflects that Mother was aware of Father's drinking habits at the time of the divorce. Father testified that he recently quit drinking beer. The children corroborated this testimony. No evidence was presented showing that Father's drinking habits had detrimentally affected the children's well-being.

The next relevant factor for our consideration is the "home, school and community record" of the children. Tenn. Code Ann. § 36-6-106(a)(6). The trial court reviewed the children's school records and found the children to be doing well in school. There is no evidence suggesting that the children have had any behavioral problems at home, school, or in the community. Although not a determining factor, the trial court also considered the children's preferences. *See* Tenn. Code Ann. § 36-6-106(a)(7). The children testified that they wanted to continue to live with Father because of the close proximity of their family and friends. The children also stated that they wanted visitation with Mother to stay the same.

The record does not reflect any allegations of physical or emotional abuse of the children. *See* Tenn. Code Ann. § 36-6-106(a)(8). However, the children testified to witnessing a physical fight between Mother and Mother's new husband. The children stated that a picture frame was thrown and broken during that incident. They also stated that, during the fight, Mr. Wallace grabbed Mother

around the throat as if to choke her. The children testified that they were crying and very scared. Mother and Mr. Wallace denied the incident. The trial court noted that it placed little weight on the alleged incident.

The trial court heard proof that both parties had resided with members of the opposite sex, to whom they were not married, while the children were with them. *See* Tenn. Code Ann. § 36-6-106(a)(9). Mr. Wallace testified that he and Mother lived together prior to getting married and that, during that time, they slept in the same bed when the children visited. At the time of the hearing in this case, Melissa Gibson, Father's then-girlfriend, was living with Father. The trial court directed Ms. Gibson to move out of Father's home if the two remained unmarried. Father and Ms. Gibson were married on April 1, 2005. The evidence shows that Ms. Gibson has taken an active role in the lives of the children and that Ms. Gibson and the children have a close and loving relationship. She frequently takes the children to and from school and to church. There is nothing to suggest that Ms. Gibson is anything but a positive influence in the children's lives.

With respect to the parties' willingness to facilitate and encourage a close relationship between the children and the other parent, the children testified that Mother did not always allow them to answer the phone when Father called while they were at Mother's home in Georgia. *See* Tenn. Code Ann. § 36-6-106(a)(10). When asked by Mother's counsel whether he has "ever told the kids that [he] can't stand" Mr. Wallace, *i.e.*, the children's stepfather, Father testified, "I'm sure I have." The preponderance of the evidence, however, suggests that Father encourages the children's relationship with Mother and Mother's family.

After reviewing the evidence presented in light of the foregoing factors, we hold that the trial court did engage in a comparative fitness analysis as directed by our remand. We further conclude that the evidence does not preponderate against an award of custody to Father. Accordingly, we find no abuse of discretion on the part of the trial court in awarding custody to Father. *See Gaskill*, 936 S.W.2d at 631.

III.

Mother also argues that the trial court committed reversible error by "stall[ing] and delay[ing]" the proceedings that followed this Court's opinion and remand instructions. *See State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995) ("[A] trial court should interpret an order remanding a case as implicitly requiring a prompt hearing in accordance with the remand."). Our previous opinion containing the remand instructions was filed on June 15, 2004. Mother contends that an "unreasonable delay" occurred in that the trial court did not conduct its evidentiary hearing until November, 2004 or sign its final order until September, 2005. This issue is also found adverse to Mother.

The parties' first appearance following our remand instructions occurred on July 19, 2004, *i.e.*, less than one month after our earlier opinion was filed. At Mother's request, the guardian ad litem was appointed at this hearing. The parties and the trial court thereafter agreed to hold the

evidentiary hearing on September 15, 2004. On August 31, 2004, an agreed order was filed continuing the hearing from September 15, 2004 to November 17, 2004. The trial court held a hearing on November 17, 2004. At this hearing, the trial court was made aware of the fact that Father had received a copy of Mother's trial brief just two days prior. Father requested that he be allowed time to file a response to Mother's trial brief before the trial court rendered its decision. The trial court agreed and granted Father 15 days to file a brief in response. The trial court also stated that Mother would be allowed additional time to file a reply to Father's brief and that the guardian ad litem would be permitted time to file a responsive brief as well.

Father filed his brief approximately two weeks after the November 17, 2004, hearing. Mother, however, did not file her reply to Father's response until April 29, 2005, *i.e.*, almost six months after Father filed his brief. On May 4, 2005, the parties appeared before the trial court to present oral argument. However, the guardian ad litem had just received a copy of Mother's reply brief in that morning's mail. The trial court granted another continuance to allow the guardian ad litem time to respond.

Oral argument was finally heard on July 18, 2005. The trial court rendered its opinion from the bench on that same day. Mother submitted her proposed order for the trial court's approval and signature around August 30, 2005. Father disagreed with Mother's proposed order and subsequently submitted his own proposed order for the trial court's approval and signature. The trial court signed and filed the order submitted by Father on September 21, 2005, *i.e.*, less than 30 days after the parties submitted their proposed orders.

The foregoing facts clearly show that Mother acquiesced in any delay in the proceedings that followed our remand instructions. Furthermore, we find that Mother, not the trial court, was the cause of much of the delay.

IV.

The judgment of the trial court is affirmed. This case is remanded to that court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Stephanie Ann Thurman Wallace.

CHARLES D. SUSANO, JR., JUDGE